No. 63

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

PHILIP R. CONSOLO, *Petitioner,*

v.

FEDERAL MARITIME COMMISSION, UNITED STATES OF AMERICA, AND FLOTA MERCANTE GRANCOLOMBIANA, S.A., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Court of Appeals (R. 686-698) is reported in —— App. D.C. ——, 342 F.2d 924 (1964). The prior opinion of the Court of Appeals which remanded the case to the Federal Maritime Commission (R. 650-667) is reported in 112 App. D.C. 302, 302 F.2d 887 (1962).

JURISDICTION

The judgment of the Court of Appeals dismissing the petitions for review was entered on December 17, 1964 (R. 699). The petition for certiorari was filed on March 16, 1965 and was granted on June 1, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1); see 5 U.S.C. § 1040.

QUESTIONS PRESENTED

Where the Federal Maritime Commission found that a common carrier by water had discriminated against a shipper by denying him space in violation of Sections 14 and 16 of the Shipping Act, 1916, 46 U.S.C.A. §§ 812, 815, and entered an order awarding reparation to the injured shipper:

1. Did the Court of Appeals have jurisdiction under the Administrative Orders Review Act of 1950 (the Hobbs Act), 5 U.S.C.A. § 1031 et seq., to review the reparation order on petition of the carrier, thus subjecting the shipper to a double set of judicial proceedings in enforcement of a reparation order, or was it required to relegate the carrier to the defense of a suit brought by the shipper in a district court under Section 30 of the Shipping Act, 1916, 46 U.S.C.A. § 829, thereby preserving the venue and other advantages which Section 30 affords to shippers?

2. Was the Court of Appeals correct in announcing a new standard for award of reparation: that the Commission should find reparation to be "equitable" in addition to finding the carrier's discrimination to be unjust and unreasonable?

3. When the Commission upon remand found that award of reparation was equitable and found as a

fact that the carrier's defenses were not bona fide, did the Court of Appeals apply a proper standard for review in setting aside the order by making its own contrary findings of fact?

STATUTES INVOLVED

The statutes involved are the Shipping Act, 1916, as amended, 46 U.S.C. 801, et seq., and the Administrative Orders Review Act of 1950 (Hobbs Act), 5 U.S.C. 1031 et seq. Pertinent provisions of Sections 14, 16, 22, 29, 30 and 31 of the Shipping Act and Sections 1031, 1032, 1039 and 1040 of the Hobbs Act are set forth in Appendix A hereto, pp. 1(a)-5(a).

STATEMENT

1. THE EXCLUSION.

Petitioner Philip R. Consolo ("Consolo") is an independent importer of bananas into the United States; such importers must obtain supplies of bananas in Ecuador, where fruit is freely available (R. 86). Bananas must be imported from Ecuador under refrigeration (R. 87-88). Flota Mercante Grancolombiana ("Flota") is a common carrier by water in the foreign commerce of the United States (R. 74-75). Flota maintained a regular weekly service from Ecuador to United States North Atlantic ports with ships having refrigerated cargo space in one hold suitable for carriage of bananas (R. 76; 77), the balance of the ships being used for general, non-refrigerated cargo (R. 77). Only Flota and the Grace Line maintained regular weekly service from Ecuador with refrigerated space suitable for banana carriage (R. 86). The Federal Maritime Board, the agency administering the Shipping Act, 1916 (39 Stat. 728, as amended; 46 U.S.C.

801, et seq.)[1] has twice held that the Shipping Act compelled the Grace Line, as a common carrier, to offer refrigerated space to all qualified banana shippers.[2]

In June, 1955, Flota had entered into an exclusive dealing contract with one banana importer, Panama Ecuador Shipping Corporation, for the exclusive use of all refrigerated space on Flota's ships coming from Ecuador to United States North Atlantic ports (R. 177); this contract had a three year renewal option (R. 184). In February, 1957, as a result of repeated demands by Consolo (R. 97-98; 150) Flota informed Consolo he could "favor our company with a bid" for refrigerated space (R. 204b-205) (no rate was quoted). Prior to receiving Consolo's bid, on March 13, 1957 Flota's Board of Directors decided to continue its exclusive-dealing contract with the preferred shipper (R. 432-433; 436-437).

The Federal Maritime Board's second decision striking down such exclusive contracts as illegal discriminations appeared April 29, 1957: *Banana Distributors* v. *Grace Line,* 5 F.M.B. 278. Flota, aware of the decision (R. 152) nevertheless signed another three-year exclusive contract with its preferred shipper on May

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[1] The Federal Maritime Commission is the present successor agency to the Federal Maritime Board; 1961 Reorganization Plan No. 7, 26 F.R. 7315, 75 Stat. 840, note 46 U.S.C.A. § 1111.

[2] Philip R. Consolo v. Grace Line, 4 F.M.B. 293 (June 23, 1953); Banana Distributors v. Grace Line, 5 F.M.B. 278 (April 29, 1957), remanded for additional findings, Grace Line v. Federal Maritime Board, 263 F. 2d 709 (C.A. 2, 1959); Supplemental Report 5 F.M.B. 615 (1959), affirmed 280 F.2d 790 (C.A. 2, 1960), cert. denied 364 U.S. 933.

22, 1957 (R. 187). Finally, on June 21, 1957, Consolo was notified that the contract had been signed (R. 207).[3]

Consolo renewed his demand for space (R. 208), and on October 21, 1957 counsel for Consolo notified Flota that if a fair amount of space was not alloted to Consolo a complaint would be filed with the Federal Maritime Board on November 15, 1957 (R. 209). Flota still gave Consolo no space, and instead filed a petition for declaratory order with the Board (R. 37-41). Consolo's complaint was duly filed on November 15, 1957, seeking space and reparation for exclusion.

During the course of the Board hearings in 1958, Flota's preferred shipper threatened to breach its contract unless rate concessions were forthcoming (R.151-152). Flota granted such concessions (R. 191-195) without offering any space to Consolo (R. 150).

2. THE LITIGATION.

(a) Proceedings Before the Board

Flota's counsel opened his defense at the Board hearing by announcing that Flota accepted the Board's decision in *Banana Distributors* v. *Grace Line,* 5 F.M.B. 278 (1957), as "good law but inapplicable because of the differences [in vessels] which we have set forth . . ." (R. 133-134).[4]

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[3] The preferred shipper also obtained space on the Grace Line as a result of the *Banana Distributors* decision (R. 155).

[4] This position of Flota is highly significant because of Flota's later claim that it was confused by the unsettled state of the law. It was not confused (R. 134):

"Mr. Giallorenzi [counsel for Flota] . . . . Again I repeat, assuming that the [Banana Distributors] Grace Line decision is good, valid law, and we are not attacking that in any manner shape or form—

"Examiner Robinson: You think your facts differentiate your case from the necessary holdings in the Grace Line case?

"Mr. Giallorenzi: That is right."

In the first phase of the hearings the Board's Examiner, and the Board, found that "the arguments relating to the differences between Flota's vessels and Grace's vessels are not impressive" and held that Flota had violated sections 14 and 16 of the Shipping Act by discriminating against Consolo (*Consolo* v. *Flota Mercante Grancolombiana,* 5 F.M.B. 633, 639-40, June 22, 1959). Flota was ordered to open its space to all qualified banana shippers upon a fair and reasonable basis (5 F.M.B. at 642), and the case was returned to the Examiner for determination of reparation due.

In the next phase of the hearings, on reparation, Consolo proved in enormous detail his damages, sailing by sailing, for each sailing from which he was excluded by Flota (R. 445-449). The Examiner recommended and award of reparation of $259,812.26, plus interest (R. 255-262). The Board, upon exceptions, cut the award back to $143,370.98, by restricting the period of reparation, and the basis of allocation of space to Consolo, and denied any interest (6 F.M.B. 262, March 28, 1961; R. 265-280). Flota did not pay.

(b) First Opinion on Review

Flota filed two separate petitions with the Court of Appeals for the District of Columbia Circuit, the first attacking the Board's decision on the merits (i.e., the Board decision of June 22, 1959, 5 F.M.B. 633 that Flota had violated the Shipping Act), and the second attacking the decision awarding reparation (the decision of March 28, 1961, 6 F.M.B. 262; R. 265). Consolo sought review of the Board's reduction of the reparation award.[5]

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[5] Consolo's petition followed the holding in D. L. Piazza Co. v. West Coast Line, 210 F. 2d 947 (C.A. 2, 1954), cert. denied 348 U.S. 839, that denials of reparation are reviewable under the Hobbs Act. The Piazza case is discussed below, at pages 23-29.

Flota's petition to review the reparation order claimed that jurisdiction to review existed under the Administrative Orders Review Act of 1950 (Hobbs Act), 5 U.S.C. 1031 et seq. Shipping Act reparation orders are not self-enforcing, the shipper being required by section 30 of the Act (46 U.S.C. 829) to file suit on a reparation order in a District Court in order to collect. In previously reported cases under the Shipping Act, the offending carrier had awaited suit to present its defenses: e.g., *Roberto Hernandez, Inc.* v. *Arnold Bernstein, Inc.,* 116 F. 2d 849 (C.C.A. 2d, 1941).

Consolo moved to dismiss the Flota petition for review for want of jurisdiction or, alternatively, to require Flota to file a bond, pointing out that Flota was seeking two reviews of the reparation order, one in the Court of Appeals and one in District Court when Consolo sued to enforce the order (R. 621-636).

The Court of Appeals, in its decision of April 26, 1962 (*Flota Mercante Grancolombiana* v. *Federal Maritime Commission,* 112 U.S. App. D.C. 302, 302 F. 2d 887; R. 650):[6] (1) Affirmed the decision of the Board on the merits that Flota had violated the Shipping Act by discriminating against Consolo; (2) Considered the jurisdictional question, finding it "not free from doubt or difficulty" but held that reparation orders are reviewable under the Hobbs Act on a carrier's petition (although not enforceable by the Court); (3) Denied Consolo's petition for review of the reparation order; and (4) As to Flota's petition for review of the reparation orders, announced a new standard of review for reparation orders, holding that

[6] By this time the Federal Maritime Commission had succeeded to the duties of the Federal Maritime Board. See ftn. 1, p. 4, supra.

the Board should have considered "whether, under all the circumstances, it is inequitable to force Flota to pay reparations"—remanding for such determination (302 F. 2d at 896; R. 667).

(c) Second Commission Decision on Reparations

After receiving briefs and hearing oral argument, the Federal Maritime Commission on September 19, 1963 again reviewed Flota's excuses for excluding Consolo, held that "Flota initiated and pursued the unlawful act without good cause and without a satisfactory showing of good faith", and entered a new reparation order. (2 Pike and Fischer Shipping Regulation Reports 961 (September 16, 1963); R. 500, 513). The amount of reparation, however, was again reduced (to $106,001) since the Commission accepted a new Flota argument that Flota would have charged Consolo a higher freight rate than it actually charged its preferred shipper. Flota, followed by Consolo, again petitioned the District of Columbia Court of Appeals for review.

(d) Second Court of Appeals Decision

In its second decision, the Court of Appeals purported to review the evidence; made its own determinations as to what Flota "might reasonably have believed", "might have thought in good faith" and "could reasonably have believed"; and held "in view of the substantial evidence showing that it would be inequitable to assess damages" that the Commission's reparation order should be vacated. (*Flota Mercante Grancolombiana* v. *Federal Maritime Commission,* 342 F. 2d 924 (C.A.D.C., 1964); R. 686-698).

Consolo's petition for a writ of certiorari as to the three questions presented was granted by this court

on June 1, 1965, 381 U.S. 933, and the case set for argument immediately following No. 14 (October Term, 1965) a case which involves a question of jurisdiction to review Interstate Commerce Commission reparation orders similar to the first question presented here.

SUMMARY OF ARGUMENT

I. THE STATUTES PROVIDE ONLY ONE REVIEW OF A REPARATION ORDER: BY A DISTRICT COURT AFTER SUIT BY THE INJURED SHIPPER

Here, a common carrier by water (Flota) has discriminated against a shipper (Consolo) by totally denying him refrigerated space. At common law, an excluded shipper had a swift remedy: to sue the carrier. The Shipping Act, 1916 substituted a several-step procedure for the common law remedy. First, the agency administering the Act must find a violation. Next, the agency must find damage and enter a reparation order. Finally, the shipper must sue on the reparation award in a district court.

A reparation order is not self-enforcing, nor does a carrier risk anything by failing to comply with such an award. *Meeker* v. *Lehigh Valley R. Co.*, 236 U.S. 412, 430. Section 30 of the Shipping Act (46 U.S.C. 829) deals specifically with reparation orders and provides that they are to be "prima facie" evidence in suits brought upon reparation awards in district courts. Nevertheless, in order "to discourage harassing resistance by a carrier" and "to promote a closer observance by carriers of [their] duties" (*Baldwin* v. *Scott County Milling Co.*, 307 U.S. 478, 482-83), Section 30 grants shippers the benefits of attorney's fees if they prevail, excuses shippers from costs, and provides convenient venue for suit.

The decision below holds that Section 2 of the Administrative Orders Review Act of 1950 (Hobbs Act) (5 U.S.C. 1032) gave the courts of appeals jurisdiction to review orders granting reparation, because the Hobbs Act transferred to the courts of appeals jurisdiction to review (but not to enforce) such orders as were subject to judicial review pursuant to Section 31 of the Shipping Act (46 U.S.C. 830). Section 31, however, is not the section of the Shipping Act dealing with reparation orders. Reparation orders are covered by Section 30 (46 U.S.C. 829) which provides for suits by injured shippers in a district court. In such a suit, a carrier can present all defenses, and the injured shipper is protected by the special provisions of Section 30. Thus, the language and structure of the Act negative any intent to provid for carrier-instigated review of reparation orders. Therefore, no such jurisdiction was transferred by the Hobbs Act.

The nature of a reparation order as prima facie evidence, "not final or binding" upon the carrier, has led to a uniform understanding that such orders are not subject to direct judicial review at a carrier's instance, evidenced by the consistent practice of carriers to await suit by shippers: *United States* v. *Interstate Commere Commission,* 337 U.S. 426, 435; *Roberto Hernandez Inc.* v. *Arnold Bernstein,* 116 F. 2d 849 (C.C.A. 2d, 1941); *United States* v. *Interstate Commerce Commission,* 198 F. 2d 958, 963-64, note 2 (C.A.D.C., 1952), cert. denied 344 U.S. 893.

The review contemplated by the decision below is an anomaly. Because the courts of appeals cannot enforce reparation awards, it adds to an already difficult schedule of litigation an unnecessary, non-final and intermediate review, where the shipper cannot win

but may lose. Indeed, since the court of appeals order is not binding and conclusive (on the carrier) the decision below raises the Constitutional question whether a case or controversy is being heard: *Chicago and Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 113-14.

The decision below is in conflict with the teachings of *United States* v. *Interstate Commerce Commission*, 337 U.S. 426, 441-43. Contrary to this Court's decision that cases involving reparation were to be heard only by one-judge district courts, the court below holds that three judge courts of appeals substituting for three judge district courts can review reparation awards. The conflict is directly evident, as is the impolicy of the decision below.

II. THE HITHERTO UNKNOWN STANDARDS OF DECISION AND REVIEW ANNOUNCED BY THE COURT BELOW ARE JUSTIFIED BY NEITHER STATUTE, NOR PRECEDENT, NOR POLICY

Although the court below affirmed the agency's decision that Flota had unjustly discriminated against Consolo, it remanded the reparation order for consideration whether it would be "inequitable to force Flota to pay reparations". The doctrine that an agency cannot make an award of reparation for unjust exclusion without finding it "equitable" is a new principle of carrier law, hitherto unknown.

Next, after the agency on remand found all equities in favor of the injured shipper, the court below itself reviewed the evidence *de novo*, made its own findings of fact, and reversed.

Both the substantive doctrine of "equity" announced below and the mode of review employed below require

explicit rejection by this Court to prevent serious damage to the rights of injured shippers. Both are clearly wrong.

The Shipping Act speaks of unjust, unreasonable or unfair discriminations and prejudices, the well-known touchstones of agency discretion to regulate. The statute does not mention "equity". The sudden importation of such an unknown standard into regulatory law leaves agencies at sea, a confusion which can only benefit carriers defending otherwise plainly illegal acts.

All past cases have emphasized the fundamental nature of a common carrier's duty to carry, and concur in holding that reparation is due for failure in the duty: *Pennsylvania R. Co.* v. *Puritan Coal Mining Co.,* 237 U.S. 121; *Midland Valley R. Co.* v. *Excelsior Coal Co.,* 86 F. 2d 177 (C.C.A. 8th, 1936); *Roberto Hernandez, Inc.* v. *Arnold Bernstein,* 116 F. 2d 849 (C.C.A. 2d, 1941). In short, there is no doctrine of "equitable" refusal to award reparation for damages from unjust exclusion, and there ought to be none.

The standard of review employed by the court below is equally unknown to the law. Neither the Shipping Act nor the Hobbs Act grants any jurisdiction to reviewing courts to determine facts *de novo.* Yet, the court below proceeded to find facts anew, as to Flota's state of mind when it excluded Consolo. The court below did not inquire, as it should have, whether there was substantial evidence in the record to sustain the findings of the agency (as there plainly was). This, however, is the standard of review time and again laid down by this Court: *Securities and Exchange Commission* v. *Chenery Corp.,* 332 U.S. 194, 207; *Rochester*

Telephone Corporation v. *United States,* 307 U.S. 125, 145-46. In order to return the law of judicial review in reparation cases to its proper place within the established pattern of judicial review, the decision below should be reversed.

ARGUMENT

I. THE STATUTES PROVIDE ONLY ONE REVIEW OF A REPARATION ORDER: BY A DISTRICT COURT AFTER SUIT BY AN INJURED SHIPPER

A. The Shipping Act, 1916

At common law, the remedy of a shipper refused space by a common carrier was swift and simple: the shipper sued the carrier. Ocean carriers were no exception: *Swayne & Hoyt* v. *Everett,* 255 Fed. 71, 74 (C.C.A. 9th, 1919). Indeed, the liability of a common carrier to suit was often stated as part of the definition of a common carrier. In *The Wildenfels,* 161 Fed. 864, 866 (C.C.A. 2d, 1908), the Court cited Moore on Carriers:

> "'According to all the authorities, the essential characteristics of the common carrier are . . . that, if he refuse, without some just ground, to carry goods for any one, in the course of his employment and for a reasonable and customary price, he will be liable to an action.'"

The Shipping Act did not destroy, but reinforced common law liability for illegal exclusion. The Shipping Act "embodies a remedial system that is complete and self-contained" and "gives a cause of action for damages". *Terminal Warehouse* v. *Pennsylvania R. Co.,* 297 U.S. 500, 514.

The remedial system embodied in the Shipping Act, 1916, and the procedure to be followed by injured

parties, are clear on the face of the statute. Sections 14 and 16 of the Act (46 U.S.C.A. 812, 815) prohibit discriminatory acts. Section 14 Fourth, in particular, forbids any common carrier by water (such as Flota) to "make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of . . . cargo space accommodations. . . ." Flota's action in totally excluding Consolo and contracting all its refrigerated space to a single preferred shipper plainly was, and was held to be, a violation of this section.

Moreover, Section 16 First (46 U.S.C.A. 815), in more sweeping language, forbids any common carrier by water "to make or give any undue or unreasonable preference or advantage to any particular person . . . or to subject any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." It is hard to imagine a prejudice or disadvantage more sweeping than an outright denial of any space. Flota's total exclusion of Consolo for a period of years was, and was held to be, a plain violation of Section 16.

A shipper injured by a forbidden act of a carrier is given two remedies by Section 22 of the Shipping Act (46 U.S.C. 821): first, the injured shipper may file a complaint, which the Board may investigate and "make such order as it deems proper." Second, the Board "may direct the payment . . . of full reparation to the complaint for the injury caused by such violation." Thus, there is both a public and a private remedy provided for violations of the Act.

The public remedy is an order of the agency requiring the carrier to behave in the future. Here, the

public remedy is found in the order of the Federal Maritime Board requiring Flota to open its refrigerated space to all future qualified banana shippers (R. 11-13; 5 F.M.B. 633 at 641-43). The private remedy is a reparation order, repairing the damage done by the past violation of the Act. The reparation order itself has long been recognized to have two beneficial aspects. Substituting for the common law liability of common carriers, it repairs a harm (which is in the public as well as private interest) and, in addition, it promotes "a closer observance by carriers of the duties so imposed [by the statute]". *Meeker* v. *Lehigh Valley R. Co.*, 236 U.S. 412, 433; *Baldwin* v. *Scott County Milling Co.*, 307 U.C. 478, 482.

Absent a provision for reparation, the remedial system of the Shipping Act would be incomplete. Past wrongs would not be righted, and there would be no "healthy deterrent effect" upon carrier malpractices —the shipper would be "entirely at the mercy of the carrier, contrary to the overriding purpose of the Act". *Hewitt-Robins, Inc.* v. *Eastern Freight-Ways, Inc.*, 371 U.S. 84, 88.

The procedures laid down in the Shipping Act for enforcement of agency orders emphasize both the importance of both types of agency order and their differences. Orders of the agency "other than an order for the payment of money" (1) if violated are enforceable under section 29 (46 U.S.C.A. 828) and (2) under Section 31 (46 U.S.C.A. 830) "The venue and procedure . . . in suits to enforce, suspend, or set aside in whole or in part, any order of the [agency] shall, *except as otherwise provided,* be the same as in similar suits in regard to orders of the Interstate Commerce Commission. . . ." (emphasis supplied).

Orders for the payment of money—reparation orders —are "otherwise provided" for in Section 30 of the Shipping Act (46 U.S.C.A. 829). Reparation orders are neither self-enforcing nor subject to enforcement by the agency under Sections 29 or 31. Instead, under Section 30: (1) the injured party may file suit on the award in a United States District Court where the shipper resides, *or* where there is any office of the carrier *or* wherever the carrier calls; (2) the reparation order is "prima facie evidence of the facts therein stated"; (3) the injured party is not liable for costs (except on his appeal); (4) a beneficiary of a reparation order is entitled to a reasonable attorney's fee if he finally prevails; and (5) provision is made for easy joinder of parties.[7]

This statutory scheme is simple: orders not for the payment of money are reviewable in three-judge courts (Section 31; 46 U.S.C.A. 830). Reparation orders are *not* reviewable by three-judge courts, because they are to be handled "as otherwise provided" in their own special section of the Act (Section 30, 46 U.S.C.A. 829). That section provides for suit to enforce reparation orders *only* by the injured party. There is no

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[7] Sections 29, 30 and 31 of the Shipping Act (46 U.S.C.A. 828, 829, 830) are of course either similar to, or outright inclusions of, provisions relating to railroads:

> "While the part of the bill relating to the regulation of carriers by water differs necessarily and materially from the corresponding provisions of the interstate commerce act, the difference is not so radical that the administration and enforcement provisions of the latter act and the nearly 30 years' experience of the Interstate Commerce Commission cannot be adopted with slight modifications to the purposes of this bill." S. Rept. No. 689 to accompany H.R. 15455, 64th Cong., 1st Sess., at p. 12.

provision for the wrongdoing carrier to review a reparation order prior to being sued for a very simple reason: no carrier has anything to fear from a reparation order unless and until suit is brought on an order.

Consider, for example, what happens to a carrier against whom a reparation order is entered if the injured shipper does not sue on the order. What happens is precisely nothing. The shipper had a right to bring suit, but if the right is not used, the carrier suffers nothing. A reparation order is, by definition, an order for the payment of money and nothing else; it relates to a past violation. Other orders under the Shipping Act, in contrast, relate to the future, are of general effect, and are naturally reviewable at the carrier's instance.

The differences between reparation orders and other orders are not only plain on the face of the statute, they have also been plain to this and other Federal courts, as we next show.

B. The Precedents and the Uniform Practice

The Shipping Act provides a three-judge I.C.C.-type procedure for reviewing orders of general future importance, and a one-judge enforcement procedure for reparation orders. In *United States* v. *Interstate Commerce Commission,* 337 U.S. 426, 441-443 the Court was at pains to emphasize "the belief of Congress that such [reparation] orders are not of sufficient importance to justify the accelerated judicial review procedure" (337 U.S. at 442).

Again, in concluding that denials of reparation should be reviewed by a one-judge district court, this

court referred to "the same one judge trial *and appeal* procedure available for enforcement of [a reparation] order . . ." (337 U.S. at 443; emphasis supplied).

The teachings of *United States* v. *Interstate Commerce Commission* are unmistakeable: (1) reparation orders are essentially different from orders of general future applicability; (2) cases involving only reparation orders are to be heard by one-judge, not three-judge courts; (3) a reparation order "is not final or binding upon the railroad"—it requires a suit to enforce it (337 U.S. at 435).

The history of litigation under both the Interstate Commerce Act and the Shipping Act, 1916, evidences a uniform understanding that reparation orders are not reviewable at the carriers instance, and most certainly not reviewable in a three-judge court. For example, in *H. K. Porter Co.* v. *Central Vermont Ry. Co.*, 366 U.S. 272, 274 at note 6, this Court said that a reparation order "when and if made, can be challenged before a single judge . . ." The uniform practice has been for review of reparation orders to await suit by the injured shipper. The Interstate Commerce Act citations could be multiplied. Examples abound in this court: e.g. *Meeker* v. *Lehigh Valley R. Co.*, 236 U.S. 412; *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531; *Pennsylvania R. Co.* v. *Weber*, 257 U.S. 85; and in lower federal courts: e.g., *Midland Valley R. Co.* v. *Excelsior Coal Co.*, 86 F. 2d 177 (C.C.A. 8th, 1936). Under the Shipping Act, however hard-fought the defense, carriers have again awaited suit on reparation orders: *Compagnie Generale Transatlantique* v. *American Tobacco Co.*, 31 F. 2d 663 (C.C.A. 2d, 1929), cert. denied 280 U.S. 555;

Roberto Hernandez, Inc. v. *Arnold Bernstein, Inc.*, 116 F. 2d 849 (C.C.A. 2d, 1941).

For the last half century, at least,[8] courts have believed that a reparation order "is not a binding administrative determination . . . no such order has ever been the subject of direct judicial review." *United States* v. *Interstate Commerce Commission*, 198 F. 2d 958, 963-64, note 2 (C.A.D.C., 1952), cert. denied 344 U.S. 893.

C. The Hobbs Act and the Decision Below

The court below here purported to find in the Administrative Orders Review Act of 1950 (Hobbs Act), 64 Stat. 1129, 5 U.S.C. 1031 et seq., jurisdiction to review a reparation order at the instance of the carrier, prior to suit in a District Court by the injured shipper.

The Hobbs Act, 5 U.S.C.A. 1032, grants the courts of appeals "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . such final orders of the . . . Federal Maritime Board . . . entered under authority of the Shipping Act, 1916 as amended . . . as are now subject to judicial review pursuant to the provisions of section 830 of Title 46."

The order granting Consolo reparation was entered under authority of the Shipping Act, 1916, and the precise question is thus whether reparation orders were

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[8] Flota's reply to our petition for certiorari cites two long-forgotten Commerce Court cases as holding that prior to 1913 that courts reviewed reparation orders: *Southern Ry.* v. *United States*, 193 Fed. 664 (Commerce Ct., 1911); *Arkansas Fertilizer Co.* v. *United States*, 193 Fed. 667 (Commerce Ct., 1911). These cases of course predate the Urgent Deficiences Act of 1913, 38 Stat. 208.

such orders as were reviewable "pursuant to the provisions of Section 830 of Title 46." The plain answer is: no. Section 830 (Section 31 of the Shipping Act) is *not* the section dealing with reparation orders. It is, instead, the section dealing with orders to be reviewed by three-judge courts; reparation orders were handled "as otherwise provided" in the section dealing with reparation orders.

No matter how examined, the statutory language is airtight. The courts of appeals received only jurisdiction to review the orders reviewable by three-judge courts under Section 31 of the Shipping Act (46 U.S.C. 830). Orders granting reparation are plainly not reviewable by three-judge courts under the Shipping Act itself, nor under the teaching of *United States* v. *Interstate Commerce Commission,* 337 U.S. 426, 441-443. Hence, the courts of appeals did not receive a grant of jurisdiction under the Hobbs Act to review reparation orders.

D. Relationship of the Issues Here and in No. 14

It may be well to pause here to note the relationship of the jurisdictional issue in this case with the issue posed in *Interstate Commerce Commission* v. *Atlantic Coast Line R. Co.,* No. 14 (decision below, 334 F. 2d 46 (C.A. 5, 1964)). The *Atlantic Coast Line* case raises the question whether a carrier can bring suit to review an Interstate Commerce Commission reparation order prior to suit by an injured shipper. This case, of course, raises the same question under the Shipping Act. If, as both the Interstate Commerce Act and the Shipping Act plainly intend (and the nature of a reparation order requires), a carrier cannot bring suit, then the court of appeals here had no

jurisdiction to review. In other words, a decision that reparation orders are not reviewable at a carrier's instance will decide the jurisdictional issue in this case and in *Atlantic Coast Line.*

But, if it be assumed *arguendo* that the Shipping Act does somehow permit a carrier to obtain review, the question remains: where? In *Atlantic Coast Line* the carrier at least brought suit in a district court, the forum required by the decision in *United States* v. *Interstate Commerce Commission,* 337 U.S. 426. The district court would have jurisdiction to enforce the reparation order at the shipper's request. Here, in contrast, the carrier did not seek review by a one-judge district court, but sought review by a court of appeals with no enforcement power, substituting under the Hobbs Act for a three-judge court. This is precisely the forum which this Court said in *United States* v. *Interstate Commerce Commission,* 337 (U.S. at 441-443, should *not* consider reparation orders.

E. The Decision Below and Its Effects

The court below appears to have based its conclusion that it had jurisdiction on three grounds:

(1) First, said the court below, courts of appeals received, by the Hobbs Act, jurisdiction to "set aside" orders "formerly possessed by the District Court under Section 31 of the Shipping Act" (302 F. 2d at 893; R. 660). A crucial difficulty, that Section 31 dealt only with *three-judge* district court review is passed with the comment that "Congress, in passing the Hobbs Act, could hardly have intended to retain this distinction, with respect to Maritime Board orders" (302 F. 2d at 893, note 10; R. 661).

(2) The case of *D. L. Piazza* v. *West Coast Line,* 210 F. 2d 947 (C.A. 2, 1954), cert. denied 348 U.S. 839,

held that the Hobbs Act conferred jurisdiction on Courts of Appeals to review denials of reparation.[9] Hence, said the court below here, "Once here, the order should be reviewable in its entirety" (302 F. 2d at 893; R. 661).

(3) In any event, said the court below, the Hobbs Act was intended "to clarify and simplify the review situation . . . rather than to perpetuate distinctions between awards, denial of awards, and other Federal Maritime Boar ctions, unless such distinctions are inevitable" (302 F. 2d at 894; R. 662). Each of these three grounds is demonstrably wrong.

The first ground simply begs the questions. Of course the Hobbs Act transferred Section 31 reviews to courts of appeals, but the questions are (1) whether any carrier suit to review reparation orders lies under the Shipping Act; and (2) even assuming that such a suit could have been brought under the Shipping Act, could it have been brought in any court other than a one-judge district court? Both questions were discussed above.

The second ground relied upon by the court below (that "once here the order should be reviewable in its entirety") is also wrong. The most obvious defect in the reasoning of the court below is that an order granting reparation is not "reviewable in its entirety" by a court of appeals under the Hobbs Act. The Hobbs Act confers no jurisdiction to enforce reparation orders, and an injured shipper must bring a separate suit to enforce reparation orders in a district court, under Section 30 of the Shipping Act. Considerations

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[9] The *Piazza* case of course forced Consolo to bring his petition to review to the court below.

of economy and simplicity require that a carrier's defenses to a reparation order should be adjudicated when and if a shipper sues on an order, by the court considering the suit. There is a clear difference between appellate consideration of a shipper's attempt to obtain a reparation order from an agency and appellate consideration of a reparation order issued by an agency before suit is brought on the order. A reparation order is a condition precedent to bringing suit; a shipper must reverse the agency action and obtain an order before he can sue. In contrast, when a reparation order has been issued, no further agency action is needed, and a carrier can present all defenses when suit is brought.

The decision in *D. L. Piazza* v. *West Coast Line,* 210 F. 2d 947 (C.A. 2, 1954), is not applicable to the jurisdictional problem presented here. *Piazza* involved a shipper's suit to review a denial of reparation. The court agreed that absent the Hobbs Act, the doctrine of *United States* v. *Interstate Commerce Commission,* 337 U.S. 426 required that the shipper's suit be brought in district court. But, the court in *Piazza* reasoned, (1) *United States* v. *Interstate Commerce Commission* found jurisdiction to review denials of reparation in what is now Section 1336 of Title 28 U.S.C.; (2) section 1336 is equivalent to Section 31 of the Shipping Act; and (3) hence jurisdiction to review denials of reparation was transferred to the courts of appeals by the Hobbs Act. Obviously, this syllogism cannot be applied to suits to review *awards* of reparation, because suits on reparation awards are governed not by Section 31, but by section 30 of the Shipping Act (46 U.S.C. 829) and section 30 jurisdiction is not transferred to courts of appeals.

Moreover, there are substantial reasons for believing that the *Piazza* decision is wrong, because it misreads *United States* v. *Interstate Commerce Commission.* What this Court said in *United States* v. *Interstate Commerce Commission,* is that in the Urgent Deficiencies Act of 1913 "Congress denied power to three-judge courts to enforce Commission orders for payment of money" (337 U.S. at 442). In a footnote at this point this Court added (337 U.S. at 442, note 15):

> "It is also significant that the new judicial code does not give a three-judge court jurisdiction to adjudicate the validity of Commission orders 'for the payment of money.' 28 U.S.C. § 2321."

Further, this Court concluded (337 U.S. at 442):

> "The Urgent Deficiencies Act with 49 U.S.C. § 9, which requires enforcement of Commission reparation awards, in one-judge courts, indicates the belief of Congress that such orders are not of sufficient public importance to justify the accelerated judicial review procedure."

Section 31 of the Shipping Act (46 U.S.C. 830) simply says that venue and procedure shall follow Interstate Commerce Act procedure. From this, it is highly difficult to conclude (as the court in *Piazza* did) that the Hobbs Act by transferring to courts of appeals "such orders as are now subject to review" under Section 31 of the Shipping Act (5 U.S.C. 1032) somehow transferred to three-judge courts of appeals orders which were not of "sufficient public importance" to justify three-judge district court consideration. The reasoning in *Piazza* is thus wrong, but right or wrong, the reasoning does not apply to carrier-instituted petitions to review reparation awards.

The last ground given by the court below for its assumption of power to review reparation awards is that the Hobbs Act was intended to "clarify and simplify the review situation. . . ." (302 F. 2d at 894; R. 662). We can agree that Congress did not intend by the Hobbs Act to muddy and complicate the review situation.[10] Yet, the decision below does muddy and complicate review and enforcement of reparation orders, as follows:

1. Allowing a carrier the novel option to obtain review of a reparation order in a court which cannot enforce the order adds another costly and burdensome step (without benefit of the protections of section 30 as to venue, attorney's fees and costs) to the already burdensome procedure for enforcing reparation orders. Under the decision below, in addition to (a) proving that the carrier violated the Act, and (b) defending this decision on review, the shipper must (c) prove to

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[10] Congress intended to simplify and expedite review. H. Rept. 2122, 81st Cong. 2d Sess. makes this quite clear. It also makes clear that the purpose was to "avoid the making of two records, one before the agency and one before the court . . ." (p. 4). Yet, the decision below requires two reviews and both a record on appeal and subsequently a second record before a district court (on suit to enforce the order).

Also, it may be well to note here that the then Solicitor of the Maritime Commission (predecessor of the Maritime Board) testified in support of extending the Hobbs Act "to all reviewable orders of the Maritime Commission". (Hearings before Subcommittee No. 3 and Subcommittee No. 4 of the House Committee on the Judiciary on H.R. 1468, H.R. 1470, and H.R. 2271 of the 80th Congress, and before Subcommittee No. 2 on H.R. 2915 and H.R. 2916 of the 81st Congress, at p. 137). However, there is no discussion in the hearings of orders granting reparation, or indication that orders granting reparation were thought to be reviewable under Section 31 of the Shipping Act or otherwise except upon suit by the injured shipper to enforce the award.

the agency his entitlement to reparation and then (d) defend the reparation order in a court of appeals, plus (e) sue to enforce the order in a district court and (f) defend the district court order on appeal. This is a schedule of litigation to discourage even the stout-hearted when faced by an obdurately litigious and well-financed carrier (such as Flota), willing to drag a case through every possible court.

An offending carrier needs no intermediate, non-final, and non-necessary opportunity for review of a reparation order, because every carrier defense can be presented as a defense to a shipper's enforcement suit in a district court in the manner provided by the Shipping Act, Section 30 (46 U.S.C. 829). Appellate review by a court of appeals of the district court's order is available as a matter of course. Nowhere in the Shipping Act or in the Hobbs Act appears the slightest indication of a Congressional intent to burden an injured shipper with an intolerable schedule of litigation to obtain pecuniary redress.

2. The purposes of the special provisions of Section 30 of the Shipping Act (46 U.S.C. 829) governing suits on reparation orders are well-known. The shipper is granted the rights to choose a convenient forum, to be free of costs, to be allowed a reasonable attorney's fee, and to bring in parties freely. By such provisions, the Shipping Act, like the Interstate Commerce Act,

> ". . . evidences purpose directly to prevent interposition of pleas lacking merit and so coercively to bring about prompt payment of the commission's awards.
>
> " '. . . One of its purposes is to promote a closer observance by carriers of the duties so imposed; and that there is also a purpose to encourage the

payment, without suit, of just demands, does not militate against its validity * * * *'

" 'The purpose of Congress in making the provision concerning costs was to discourage harassing resistance by a carrier to a reparation order.' "

—*Baldwin* v. *Scott County Milling Co.*, 307 U.S. 478, 482-83, quoting: (a) *Meeker* v. *Lehigh Valley R. Co.*, 236 U.S. 412, 433, and (b) *St. Louis & S.F.R. Co.* v. *Spiller*, 275 U.S. 156, 159.

This unmistakable purpose of Congress is frustrated if a carrier can bring its own suit for review, and thus deprive the injured shipper of the benefits provided by Congress.

3. The extra review contemplated by the decision below is an anomaly, and not a pleasant one. It is a lawsuit the shipper cannot win. If the carrier succeeds, the shipper has lost, but if the carrier fails, the shipper has not won—because he must still bring a suit to enforce the reparation award, and the carrier can defend all over again (presumably on different grounds). Heads the carrier wins; tails the carrier does not lose. Such a concept of litigation is repugnant; it destroys the fairness required of any system of judicial review. In particular it defeats the "general legislative pattern of administrative and judicial relationships" emphasized in *United States* v. *Interstate Commerce Commission*, 337 U.S. 426, 435, where this Court said:

"It hardly seems possible to find from the language of § 9 a Congressional intent to guarantee railroads complete judicial review of adverse reparation orders while denying shippers any judicial review at all."

To paraphrase, it hardly seems possible here to discern a Congressional intent to guarantee steampship lines an extra judicial review of reparation orders in which the shipper cannot win.

4. Finally, it is necessary to consider a fundamental question raised, but not answered, by the decision below: what is a court of appeals doing when it reviews a reparation order which may or may not be given effect by a district court judge or jury considering the evidence in a subsequent enforcement suit? To say the least, it is unusual for a United States court of appeals to be rendering an opinion on an order which is prima facie evidence in another court.

We need look no farther than the opinion of the court of appeals after the remand in *United States* v. *Interstate Commerce Commission* to learn why no court previously has directly reviewed an order granting reparation:

> "By statute, such an order is not a binding administrative determination, but is simply to be considered prima facie evidence of the findings embodied in it in an independent action at law against the carrier. Interstate Commerce Act, § 16(2), as amended, 49 U.S.C.A. § 16(2). Thus it happens that no such order has ever been subject to direct judicial review."

—*United States* v. *Interstate Commerce Commission,* 198 F. 2d 958, 963-64 note 2 (C.A.D.C., 1952) cert. denied, 344 U.S. 893.

The type of opinion contemplated by the court below is an opinion rendered before suit, without opportunity to pronounce final judgment in the shipper's favor, and capable of reversal by judge or jury in a later law-

suit. It is a kind of advisory opinion, to be rendered prior to the determination of a real case or controversy in a court which can pronounce final judgment.

This analysis reveals a definite constitutional infirmity in the decision below. The Constitution, Article III, extends the judicial power to cases, not to advice or inconclusive quasi-judgments:

> "This Court early and wisely determined that it would not give advisory opinions even when asked by the Chief Executive. It has also been the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action."

—*Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 113-14.

There is uneasiness manifested in the opinion of the court below when it considered the course of events. "If a carrier chooses not to obey an order of the Board for payment of reparations, even after affirmance by this court * * * * the ultimate result reached in the District Court might vary considerably from the Board's order." (302 F. 2d at 894; R. 661-662). This uneasiness is justified, because the court below was committing itself to rendering the kind of opinion forbidden by the firm and unvarying practice of Constitutional courts.

II. THE HITHERTO UNKNOWN STANDARDS OF DECISION AND REVIEW ANNOUNCED BY THE COURT BELOW ARE JUSTIFIED BY NEITHER STATUTE, NOR PRECEDENT, NOR POLICY

A. The Holdings as to "Equity" and the Function of the Reviewing Court

We have described above the ill effects on all future Shipping Act reparation cases of the jurisdictional holding of the court below. There remain for consideration the equally disastrous effects of two novel doctrines affecting the rights of shippers to reparation for illegal discriminations. A decision of this Court reversing both such doctrines is vital, we believe, not only to the present petitioner's claim, but also to all future shippers injured by a carrier's illegal act.

The court below proceeded in two steps. First, although it found that the carrier, Flota, had violated the Shipping Act, it remanded the reparation order to the Federal Maritime Board "to consider whether, under all the circumstances, it is inequitable to force Folta to pay reparations" (302 F. 2d at 896; R. 667). This discovery of a doctrine of "equity" was announced without citation, and is, we believe, without precedent.

Next, the Board's successor, the Federal Maritime Commission, obedient to the court's order, considered the equities and found all equities in favor of Consolo, the excluded shipper. Thereupon, the court below—again without benefit of citation or precedent—held that the equities were all along for the court, not the agency, to determine, and denied all reparation. (342 F. 2d at 925-31; R. 689-698). In the course of this second decision the court below took occasion to note that it thought very little of the importance of the reparation remedy (342 F. 2d at 926, ftn. 2; R. 690).

A decision of this Court which reverses the court below solely on the jurisdictional question would solve neither this petitioner's particular problem nor the problem of future injured shippers faced with the doctrines of the court below as to "equity" and judicial review of the "equity" of awarding reparation. Both petitioner Consolo and future shippers injured by unjust and unreasonable discriminations are entitled to have their reparation cases decided free from the doctrine that the reparation remedy may disappear in a reviewing court's uncontrolled "equitable" discretion. Accordingly, we respectfully urge not just a reversal of the decision below on the jurisdictional point, but reversal as to all three questions raised by this petition.

B. The Purported Discovery of a New Requirement of "Equity" in Reparation Orders

The court below held that the Maritime Board could not award reparation for a steamship line's unjust and unreasonable (and total) exclusion of a shipper unless the agency considered whether the award of proved damages would be "inequitable". Although the Shipping Act and Interstate Commerce Acts have been on the books for a very respectable period, no single citation of precedent supports this holding. The reason for such absence of citation is, we believe, that there is no precedent holding that reparation should not be paid for discriminations held to be unjust and unreasonable.

Not only is there no precedent to sustain the decision below, there is an equal lack of statutory basis. True, the Shipping Act in Section 22 (46 U.S.C. 821) says that the agency administering the Shipping Act "may" direct the payment of "full reparation to the complainant for the injury caused by such violation" of the

Act. The court below noted this "may", reading it as giving unlimited discretion to deny reparation once a violation of the Act was found (302 F. 2d at 896 ftn. 17; R. 666). A reasonable reading of all of Section 22 indicates, however, that the section concludes by saying the agency "may" award reparation because it begins by saying any person "may" file a complaint. Thus the section begins and ends with "may", while it describes in between how the Board "shall" proceed to investigate. (Shipping Act, Section 22, 46 U.S.C. 821).

Section 22, while perhaps not a model of draftsmanship, certainly does not contain any hitherto undiscovered language establishing an amorphous standard of undefined "equity" for reparation awards. The brief legislative history of the section evidences only a Congressional expectation that reparation awards would follow a violation of the Act:

> "Under Section 23 [now Section 22] any person may file with the Board a sworn complaint setting forth any violation of the Act. The board, after due notice to the person complained of, shall investigate the matter and make such order as may be proper, *including an award of reparation for any injury resulting from the violation.*" (Emphasis supplied).

—S. Rept. No. 689 to accompany H.R. 15455, 64th Cong., 1st Sess., p. 13.

We do not, of course, wish to be understood as arguing that the Shipping Act favors inequitable reparation awards. No reported case deals with a situation where the agency is struggling with an award it believes inequitable. Naturally so, because the Act gives the agency fullest powers to determine whether carrier behavior is "unfair or unjustly discriminatory" (Sec-

tion 14, 46 U.S.C.A. 812) or whether preferences, advantages, prejudices, or disadvantages are "undue or unreasonable" (Section 16, 46 U.S.C.A. 815). These words—"unfair", "unjust", "undue", "unreasonable"—are the touchstones of agency discretion. The agency can find behavior unjust for the future but not the past, or unjust and unfair in the past and for the future. All of these terms have long established meanings allowing agency discretion in the regulation of carriers.

The evil in the decision below is that all future injured shippers may be denied reparation not because the statute was not violated, not because carrier action was not unjust or unreasonable, but because it would somehow be "inequitable" to force a carrier to pay for the harm caused. The term is not statutory, it appears nowhere in previous cases, and its meaning is totally undefined. The common law remedy for injured shippers would be abolished in favor of the reaction of an agency's members to the equities—a sort of Commissioner's, not chancellor's foot.[11]

Turning to the precedents, we are unable to discover any case in all the course of previous reparation litigation, marked by a great deal of carrier resistance to paying up, where any court struck down a reparation award based on a finding of unjust and unreasonable diesrimination in the past, because the agency failed to consider whether the award was "inequitable".

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[11] It is perhaps worth noting that the "equitable" doctrine is not reflexive. The court below did not hold that shippers would be entitled to an award against carriers who had behaved justly and reasonably, simply because an award would be "equitable."

On the contrary, the court below itself has told the Federal Maritime Board

> "... the Board is not a court, and cannot rely for its action on the powers of a court of equity."

—*Trans-Pacific Freight Conf. of Japan* v. *Federal Maritime Board,* 302 F. 2d 875, 880 (C.A.D.C., 1962).

When, as here, a carrier has refused to carry, the courts have emphasized the fundamental nature of a common carrier's basic duty to carry, and insisted on carrier liability for a wrongful refusal. A number of the common law cases are collected and reviewed in *Montgomery Ward & Co.* v. *Northern Pacific Term. Co.,* 128 F. Supp. 475, 490-94 (D.C. Ore., 1953) and summarized (128 F. Supp. at 505): "The circumstances constituting the standard justifications which the common law recognized for failure to perform the obligations of a common carrier are not present here. The defendants were not prevented from transporting Ward's goods by act of God. No outright public enemies stopped them."[12]

This Court has stated the rule of damages for failure to carry:

> "At common law, a cause of action arose from the refusal of a common carrier to transport goods duly tendered for carriage. Ordinarily, the measure of damages in such case is the difference between the value of the goods at the point of tender

[12] Every text insists on the basic duty of a common carrier to carry, and its liability for a refusal. For example, 13 Am. Jur. 2d, Carriers, § 253 says: "Whenever a common carrier refuses without sufficient legal excuse, to accept property for transportation, a right of action for the damages directly and proximately resulting from such refusal accrues to the shipper . . . ."

and their value at the proposed destination, less the cost of carriage."

—*New Mexico ex rel. McLean & Co.* v. *Denver & R.G. R. Co.*, 203 U.S. 38, 49.

The precedents under the Interstate Commerce Act and the Shipping Act concur in asserting both the carrier's duty to carry, and its liability to pay damages or reparation for refusal: *Pennsylvania R. Co.* v. *Puritan Coal Mining Company*, 237 U.S. 121; *Pennsylvania R. Co.* v. *Weber*, 257 U.S. 85; *Midland Valley R. Co.* v. *Excelsior Coal Co.*, 86 F. 2d 177 (C.C.A. 8th, 1936); *Roberto Hernandez, Inc.* v. *Arnold Bernstein*, 116 F. 2d 849 (C.C.A. 2d, 1941).

In short, the settled law is that injured shippers are "entitled to full compensation for the damages sustained as a result of the wrongful discrimination against them." *Pennsylvania R. Co.* v. *Minds*, 250 U.S. 368, 370-71. This is a simple, salutary, and hitherto unquestioned rule. In its place, the court below would substitute a vague, undefined standard, leaving agencies and courts in all future cases without any established guides for decision.

The question whether a new barrier to the award of reparation for illegal exclusions can be suddenly discovered in the body of transportation law all but answers itself: there is no such doctrine of "equitable" denial of reparation, and there ought not to be one.

C. The Remarkable Standard of Judicial Review Applied in the Decision Below

The decision below not only makes new and bad substantive law of reparation, it applies to a decision under the new doctrine a wholly wrong standard of

judicial review. After the court below returned the case to the Federal Maritime Commission, the Commission considered each of Flota's arguments, judged its "protestations of innocent intent" and determined that "Flota initiated and pursued the unlawful act without good cause and without a satisfactory showing of good faith" (R. 513). Whereupon, the Commission sharply reduced the reparation award and entered a reparation order in the reduced amount.

When the court below announced the new doctrine of "equity", it seemed as if the court intended the agency to determine what was equitable or inequitable. Not so; when the court reviewed the Commission decision as to equity, the court, not the Commission, made the decision.

The opinion of the court below does not begin, as most decisions do, with citation of the precedents defining the roles of agency and reviewing court. Instead, the court noted its belief that the reparation remedy is unimportant and becoming more so (342 F. 2d at 926; R. 690). Next, the court said that "Courts and agencies should be sensitive to the considerations of equity which may make reparations an inappropriate remedy. . . ." (342 F. 2d at 926; R. 690).

There follows in the balance of the opinion a discussion of evidence which the court believed was or might be proof of Flota's good faith. This discussion begins with a wrong analysis of Flota's doubts as to its legal duties. It is very plain from the record that Flota's defense was not based on any "unsettled law"—i.e., on any doubts as to the legal validity of the Maritime Board precedents. Flota's counsel said so explicitly at the outset of the hearing: ". . . assuming that the Grace Line decision [Board precedent] is

good, valid law, and we are not attacking that in any manner, shape or form. . . ." (R. 134). In spite of this concession as to the carrier's state of mind (clearly a fact to be determined by the trier of fact), the court below held that it (the court) believed the law was unsettled.

There follow next a series of reasons (also wrong) as to why the court below thought "Flota might reasonably have believed that its situation was factually distinguishable" (342 F. 2d at 928; R. 693); why "Flota might have thought in good faith that its renewal agreement with Panama Ecuador [favored shipper] was permissible" (342 F. 2d at 929; R. 695); and why "Flota could reasonably have believed that the three-year period in its contract . . . was reasonable" (342 F. 2d at 930, R. 696).[13]

Finally, the opinion below first scolds Consolo because his damages flowed from his total exclusion by

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[13] While not expecting this court to review the evidence, we note briefly why each of these "reasonable" beliefs was plainly unreasonable:

(1) The factual distinctions between Flota ships and Grace Line ships were completely insufficient to justify exclusion of Consolo—as the Board had held (5 F.M.B. 633 at 639-40). The Board took time to consider the differences because Flota argued them—thus delaying the day it had to give space to Consolo.

(2) Flota could not have believed it could legally enter into a two year plus three-year exclusive dealing contract. The Board has approved two year contracts *only* when such contracts had been fairly offered to *all* shippers and space had been fairly apportioned. Banana Distributors v. Grace Line, 5 F.M.B. 615 at 626.

(3) Flota's petition to the Board for a declaratory order was, as the Board held, a sham, because Flota did not file a petition before executing its second three-year exclusive contract but only months thereafter, when Consolo threatened suit (R. 209-210; 37-41).

Flota, and last, reverses the Commission "In view of the substantial evidence showing that it would be inequitable to assess damages against Flota . . ." (342 F. 2d at 931; R. 698). This last quoted sentence reveals in summary what the rest of the opinion reveals in detail: the opinion below is an evidentiary decision *de novo* by the court below.

The decision below can be analyzed from two viewpoints: (1) as a decision holding by implication that the novel doctrine of "equity" requires a decision *de novo* by a reviewing court to decide the facts as to "equity" or (2) more conventionally, as a decision violating the large number of precedents which circumscribe the review of agency decisions, and particularly the review of determinations as to facts. From either point of view, the decision below is wrong.

If the decision below means that the novel "equity" doctrine as to reparation awards has as a proviso that the reviewing court is to determine the equities *de novo,* it does not take much argument to demonstrate that such a proviso is without support in statute, precedent, or policy. Neither the Shipping Act, the Hobbs Act, the Administrative Procedure Act, nor any other statute contains any hint of a grant of fact-finding authority to a reviewing court of appeals. On the contrary, the Shipping Act makes the agency the judge of what are unjust or unfair or unreasonable discriminations. The Administrative Procedure Act question is whether agency findings are "unsupported by substantial evidence" (Administrative Procedure Act, Section 10(e); 5 U.S.C.A. 1009(e)). The question is not, as put by the opinion below, whether there is substantial evidence showing the contrary of what the agency found,

but whether there is a basis in the record for what the agency *did* find.

Further, there is no support in the precedents for any holding that equitable considerations in reparation suits are for *de novo* determination by a reviewing court. The precedents say that where the agency findings

> "are supported by substantial evidence, as they were, and where no new evidence on the subject is introduced by either party at the trial, as was the case here, it is the duty of the court to accept and give them effect."

—*Roberto Hernandez, Inc.* v. *Arnold Bernstein,* 116 F. 2d 849, 851 (C.C.A. 2d, 1941).

Lastly, no policy considerations can be discerned in favor of giving the "equitable" power to deny reparations (if such power did exist) to a reviewing court rather than an agency. The agency itself is close to the facts, informed by experience, and best able to judge, if necessary, what is fair, reasonable, and, if necessary, equitable. The agency's examiner and the agency twice found for the injured shipper, rejecting claims that the structure of Flota's ships justified its behavior in excluding Consolo. Surely, such questions are and ought to be for agency determination.

There remains for discussion only the question whether any known standard of review justified the court below in making independent findings as to good faith, Flota's state of mind, and other facts. The answer is almost self-evidently no. The precedents are numerous, well-known, and conclusive:

> "Our duty is at an end when it becomes evident that the Commission's action is based on substan-

> tial evidence and is consistent with the authority granted by Congress."

—*Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 207.

Or:

> "So long as there is warrant in the record for the judgment of the expert bodies it must stand . . . 'the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.' "

—*Rochester Telephone Corporation* v. *United States*, 307 U.S. 125, 145-46, quoting *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282, 286-87.

There can be no doubt that this Court's decisions defining the scope of judicial review are applicable, and have been applied, to reparation cases. Thus, in *New Process Gear Corp.* v. *New York Central R. Co.*, 250 F. 2d 569, 572, (C.A. 2, 1957), cert. denied 356 U.S. 959, the court said:

> "The province of the appellate court was well defined in Virginian Ry. Co. v. United States, 272 U.S. 658, 663 . . . as follows: 'To consider the weight of the evidence before the Commission, the soundness of the reasoning by which its conclusions were reached, or whether the findings are consistent with those made by it in other cases, is beyond our province.' Nor can this Court say as to the Commission's conclusion 'that its finding is unsupported by evidence or without rational basis, or rests on an erroneous construction of the statute,' Barringer & Co. v. United States, 319 U.S. 1, 6-7, . . ."

In accord as to the applicability to review of reparation orders of cases such as *Universal Camera Corp.* v.

N.L.R.B., 340 U.S. 474, *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, and the like, is *United States* v. *Interstate Commerce Commission*, 198 F. 2d 958, 964 (C.A.D.C., 1952) cert. denied 344 U.S. 893.

Moreover, the courts of appeal have understood that when reviewing agency decisions they do not sit as courts of equity. Thus, in *National Labor Relations Board* v. *Southland Mfg. Co.*, 201 F. 2d 244, 245 (C.A. 4, 1952), the court said in affirming a back pay award:

> "Upon review of the Board's action we do not try the facts as a trial court nor do we review them as upon an appeal in equity. Our function is limited to determining upon the record, considered as a whole, whether the findings of the Board are supported by substantial evidence—i.e., by evidence which presents a substantial basis for the findings."

Without multiplying citations, it is clear that there is no accepted formulation of the scope of judicial review which would support the action of the court below in making its own *de novo* determinations of the facts and the "equities". The "equitable" doctrine announced by the court below, and its apparent proviso that the "equities" are for the reviewing court to find, require explicit rejection by this Court if the law of review of reparation orders is to return to its place in the established pattern of judicial review.

CONCLUSION

The decision below should be reversed on each of the three grounds urged above, and the case remanded to the Court of Appeals for the District of Columbia Cir-

cuit with instructions to dismiss the petition of the carrier (Flota) for review.

Respectfully submitted,

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